United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1115

B P/S.

To be argued by
JEREMY G. EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1115

UNITED STATES OF AMERICA,
Appellee,

—v.—

STEPHEN CARROLL,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JEREMY G. EPSTEIN,
JOHN D. GORDAN, III,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Stephen Carroll appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on March 19, 1975 after a two-day trial before the Honorable Robert J. Ward, United States District Judge, and a jury.

Indictment 74 Cr. 549, filed May 28, 1974, charged Carroll and George O'Brien in Count One with distributing 533 tablets of lysergic acid diethylamide (LSD) on October 26, 1973. Count Two charged O'Brien with resisting arrest on January 22, 1974.

Trial commenced against Carroll * on January 30, 1975 and concluded on January 31, when he was found guilty on

* O'Brien has been a fugitive since the date of the filing of the indictment.

Count One. On March 19, 1975 Judge Ward sentenced Carroll as a Young Adult Offender for observation and study pursuant to 18 U.S.C. § 5010(e). The results of such study were to be reported to the court by the Federal Youth Correction Division of the Board of Parole within sixty days. At the time of the filing of this brief, the report had not been received by the court and Carroll has not yet been resentenced. Carroll was remanded and is now serving the original sentence imposed.

Statement of Facts

The Government's Case

On October 24, 1973 Richard Simons,* a Government informant, met George O'Brien and Stephen Carroll in the area of Central Park known as the Sheep Meadow. Simons had earlier been given $9.00 by agents of the Drug Enforcement Administration with which to purchase a sample of L.S.D. After meeting with O'Brien and Carroll briefly in the park, Simons walked to Lincoln Center. Carroll then joined him there, and gave Simons 3 tablets of L.S.D. in exchange for the $9.00. (Tr. 74-78, 135-137)**

On October 26, 1973, Simons introduced Carroll to Alfred Cavuto, a D.E.A. agent acting in an undercover capacity, near Pennsylvania Station in New York City. After Simons departed, Cavuto and Carroll drove uptown to Central Park, where Carroll was to introduce Cavuto to a source of L.S.D. En route, Carroll assured Cavuto that his source was a purveyor of high quality merchandise and told Cavuto that he need have no fear of a "rip off" (Tr. 23-25).

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* The name is spelled incorrectly throughout the trial transcript as "Simmons."

** "Tr." refers to the trial transcript; "Br." refers to appellant's brief; "A." refers to appellant's appendix.

Carroll and Cavuto parked near the corner of 72nd Street and Fifth Avenue. Cavuto displayed $400.00 to Carroll and then waited in the car while Carroll contacted his source. Carroll returned shortly thereafter and announced that Cavuto would have to meet his source inside the park. Cavuto then followed Carroll to the Sheep Meadow, where he was introduced to O'Brien. Cavuto gave O'Brien the $400.00 and received in return plastic bags containing 533 tablets of L.S.D. Cavuto and O'Brien also discussed the possibility of a subsequent sale of 1000 tablets of L.S.D. O'Brien stated that in the event of a future sale, he would contact Cavuto through Carroll. As Cavuto departed, Carroll gave him a Cracker Jacks box in which to hide the L.S.D. After Carroll had accompanied Cavuto back to his car, Carroll returned to the park, where O'Brien gave him a sum of money (Tr. 25-29, 79-82, 137-139).

On November 21, 1973 Cavuto placed a phone call to Carroll. Carroll stated that O'Brien had gone to Florida and could not be reached, but suggested that he could find other sources of drugs. He stated that he had a friend "who's doing what George was doing . . . only better".* During this conversation, tentative arrangements were made for another meeting (Tr. 32-35).

No further transactions between Carroll and Cavuto took place, however, and on January 21, 1974 Carroll was arrested by D.E.A. agents at his apartment in Brooklyn. When subsequently interviewed at D.E.A. headquarters, Carroll admitted his role in arranging the sale of 533 tablets of L.S.D., and executed a written statement to that effect. In that statement he disclosed that he had known George O'Brien since 1967. He further disclosed that when he met O'Brien in 1973 after an interval of six years, O'Brien stated that he was dealing in L.S.D. and marijuana and

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* This entire conversation was tape recorded, and the recording was introduced in evidence as Government's Exhibit 3.

asked Carroll to find him customers. Carroll also confessed to watching O'Brien sell 500 tablets of L.S.D. on October 24, 1973, the day that he sold the 3 tablet sample to Richard Simons (Tr. 82-86, 140-142; GX 4).

On the following day Carroll was taken to the United States Courthouse. Prior to arraignment he was interviewed by Daniel Murphy, an Assistant United States Attorney, and again admitted his participation in the sale of October 26. (Tr. 86-90).

The Defense Case

Carroll testified in his own behalf. He stated that he had been in a methadone maintenance program since March, 1972, and that he had previously been a heroin addict (Tr. 167-171). While addicted he had purchased heroin on the street, and had also made street purchases of methadone before entering a program. In 1969 and 1970 he had sold quarter pound bags of marijuana to several different people. He had also given drugs to others on one or two occasions.

Carroll had begun living with Simons in the latter's Brooklyn apartment in July, 1973. He had known Simons for seven years and considered him a close friend. In October, 1973, Simons told Carroll that his parents would no longer pay the rent for their apartment and that Carroll would be expected to make some financial contribution. When Carroll was unable to find a job, Simons suggested that he find a source who could sell L.S.D. to a friend of his named Tony (Tr. 174-184).

Carroll finally agreed to locate a source for L.S.D., and on October 26, 1973 was introduced to Cavuto, whom Simons introduced as "Tony." He took Cavuto to Central Park, where George O'Brien sold him a quantity of L.S.D. After the sale O'Brien gave Carroll a commission of

$145, all but $5 of which Carroll gave to Simons (Tr. 184-194).

Carroll further testified that in his November 21 telephone conversation with Cavuto he had lied about having another source for drugs. He stated that he had no such source and that he lied to Cavuto in order to dissuade him from calling any further (Tr. 210-215, 232-233).

Carroll acknowledged that his post arrest statements to D.E.A. and the Assistant United States Attorney were freely and voluntarily given, and not the product of coercion either direct or implicit (Tr. 215-22).

ARGUMENT

POINT I

The prosecutor's summation was not unfairly prejudicial.

Both of the arguments presented on this appeal raise allegations of prosecutorial misconduct. In the first of these, Carroll contends that in his summation the prosecutor "made references to facts which were not presented in the testimony of any witness" (Br. 9). The supposedly offending portion of the summation can be found at pp. 264-267 of the trial transcript.

The Government submits that consideration of this argument should be barred at the threshold by defense counsel's failure to object to the statements when delivered. *United States* v. *Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd.*, 402 U.S. 146 (1971); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-9 (1940). Examination of the argument on its merits, however, discloses precisely how misguided it is. Put most simply, Carroll argues that the prosecutor made two statements that lacked testimonial

support: 1) that the Drug Enforcement Administration conducted its investigation by proceeding from one drug dealer to another, and 2) that on the date Carroll made his statement implicating O'Brien to Assistant United States Attorney Murphy, O'Brien was arrested.

The basis for the first of the assertions can be found in defense counsel's cross-examination of D.E.A. agents Cavuto and Lieneck. Carroll's counsel elicited from Lieneck and Cavuto that Simons had been recruited as an informant after he had been arrested by the D.E.A. on a drug charge (Tr. 95-100; see also Tr. 36), following which Simons introduced Agent Cavuto to Carroll. Lieneck was also cross-examined extensively concerning the manner in which he elicited a statement from Carroll on January 21, 1974. Lieneck stated, in response to defense counsel's increasingly vehement expressions of incredulity, that the agents were not principally interested in obtaining from Carroll information that would incriminate him any further, because they felt the case against him to be already a strong one (Tr. 111-113). Lieneck further stated that the agents were attempting to obtain information from Carroll, who had indicated a willingness to cooperate, about other individuals, George O'Brien among them (Tr. 109, 111).* The prosecution's interest in locating O'Brien through Carroll is also reflected in the signed confession executed by Carroll on January 22 in the presence of Assistant United States Attorney Daniel Murphy, which was quoted in the summation. The questions put to Carroll during the confession, a portion of

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* Lieneck stated, "We indicated that if he did cooperate the matter would be brought to the attention of the Court. At that time we were concerned with apprehending George O'Brien. We did not have him positively identified at that time and that is one of the matters that we were interested in the defendant giving us information on." (Tr. 109)

which is quoted in the margin,* indicate that location of O'Brien was still a preeminent concern. Given this record, we submit that it was eminently proper for the prosecutor to argue to the jury that D.E.A. conducted its investigation by proceeding from one drug dealer to another. To so argue was to do no more than describe what had happened in the instant case.

The testimonial basis for the second of the prosecutor's factual assertions is equally obvious. Although no reference was made in the direct examination of any Government witness to O'Brien's arrest, defense counsel repeatedly alluded to it on cross-examination. An examination of the record discloses three references to O'Brien's arrest (Tr. 52-53, 63, 125), all in response to questions put on cross-examination. The last of these references (Tr. 125) also mentions the date of O'Brien's arrest, January 22, 1974,

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* "Q. Who is this guy George?

A. I've known him from 1967. Not really good friends but from the good old days. I met him in the winter of 1973 and he told me he was into dealing and I didn't remember him until Richard Simons told me that he had a friend, a syndicate friend, somebody who's supposed to be in organized crime, who was interested in buying.

Q. How did you get in touch with George?

A. Well, when I remembered that he was dealing, I went up with Richard Simons to Central Park to see him.

Q. How many times?

A. I went up there twice the day before the transaction and the day of the transaction.

Q. Did you see George both times?

A. Yes.

Q. Didn't you have any trouble locating George?

A. The day before I wasn't sure he was still hanging around, but we asked a few people and they said he was still there and we took a chance and we waited and we met him.

Q. Do you know anything else about how to locate George?

A. Apart from that, no. I gave all the information I could." (GX 5A).

which was also the day Carroll was interviewed in the United States Attorney's office.

If there was any impropriety in the prosecutor's references to the purpose of D.E.A. investigations, and we submit there was none, it was more than provoked by defense counsel's summation. This Court has repeatedly observed that "attacks against the very integrity of the prosecution" can be met with "rebutting language suitable to the occasion." *United States* v. *La Sorsa*, 480 F.2d 522, 526 (2d Cir), *cert. denied*, 414 U.S. 855 (1973). See also *United States* v. *De Angelis*, 490 U.S. 1004 (2d Cir.) (Mansfield, *J.*, concurring), *cert. denied*, 416 U.S. 956 (1974); *United States* v. *Santana*, 485 F.2d 365, 370-371 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974). We therefore respectfully direct this Court's attention to defense counsel's summation, in which the Government was not only accused of entrapping Carroll, but also of deception and bad faith in not calling Simons as a witness. The jury was first invited to inquire into the "good faith" with which the Government commenced the prosecution (Tr. 249), and was then told shortly thereafter that this was a "bad faith prosecution" (Tr. 253). The prosecutor was accused of engaging in a "ruse" (Tr. 250) by not calling Simons, of "a total dereliction of duty" (Tr. 254) and of "weaseling out of producing the most important witness" (Tr. 252). In the face of these accusations, we submit that it was appropriate for the prosecutor to explain to the jury that Carroll had not been singled out for entrapment by D.E.A., but was merely deemed another link in a drug distribution conspiracy then under investigation.

None of the cases cited by Carroll in his brief bears even remotely on the argument he raises. This is not a case in which the prosecutor expressed his personal belief in the credibility of his witnesses or the guilt of the defendant. *Cf. United States* v. *Grunberger*, 431 F.2d 1062 (2d Cir. 1970); *Greenberg* v. *United States*, 280 F.2d 472 (1st Cir.

1970). Nor did the prosecutor defend his integrity by making reference to his personal practices for which there was no support in the record. *Cf. United States* v. *Spangelet*, 258 F.2d 338 (2d Cir. 1958). That Carroll has chosen to attack this portion of the prosecutor's summation is not without its irony. As the foregoing discussion demonstrates, the facts to which the prosecutor alluded were not merely in evidence; they had all been elicited by defense counsel on cross-examination.

POINT II

The prosecutor's cross-examination of Carroll was not improper.

After the Government rested a defense of entrapment was interposed through Carroll's own testimony. On cross-examination, Carroll was asked several questions about prior dealings in methamphetamines and denied ever having sold any (Tr. 222, 226-228). After the first of these questions was put to Carroll, defense counsel requested a conference at the bench and asked to know the good faith basis of the question (Tr. 223). The prosecutor replied that information about Carroll's dealings in methamphetamines had been obtained in an interview with Simons.* Judge Ward then permitted the prosecutor to pursue this line of questioning further. Carroll now claims these questions to have been improper.

As has already been noted, the defense of entrapment was raised by Carroll. It is now settled law that an entrapment defense triggers a bifurcated inquiry: the defendant is required to show some evidence of inducement, and the

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* At the request of defense counsel, Simons had been produced at the Courthouse on a writ of habeas corpus ad testificandum. (Tr. 308A). Prior to trial he was interviewed both by the prosecutor and defense counsel (Tr. 325).

Government is then compelled to prove to defendant's predisposition to commit the crime charged. *United States* v. *Viriano*, 437 F.2d 295 (2d Cir.), *cert. denied*, 402 U.S. 983 (1971). Predisposition can be shown by proving "an existing course of criminal conduct similar to the crime for which the defendant is charged." *United States* v. *Viriano*, *supra*, at 299. The Government is permitted a far broader inquiry into the defendant's background, habits, and prior criminal acts than would be permitted in the absence of an entrapment defense. As the Supreme Court stated in *Sorrells* v. *United States*, 287 U.S. 435 (1932):

> "The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense." 287 U.S. at 451-452.

See also *Sherman* v. *United States*, 356 U.S. 369, 373 (1958).

Since *Sorrells* and *Sherman* it has been established that a defendant who claims entrapment and then takes the stand can be cross examined not merely about prior convictions, but about any prior criminal activity similar to that for which he stands charged. If he denies prior criminal activity, the Government may even offer rebuttal testimony establishing such activity. *United States* v. *De Leon*, 498 F.2d 1327, 1333 (7th Cir. 1974); *United States* v. *Ellsworth*, 481 F.2d 864, 867-868 (9th Cir.), *cert. denied*, 414 U.S. 1041 (1973). See also *United States* v. *Fink*, 502 F.2d 1, 4-6 (5th Cir. 1974) (Moore, *C.J.*, sitting by designation).

Although no testimony was offered by the Government to rebut Carroll's denials of his earlier narcotics dealings,

that does not make the questions put to Carroll any less proper. Judge Ward found on two occasions (Tr. 223, 326-327) that the prosecutor had a good faith basis for asking the questions and no more than this is legally required. *United States* v. *Pacelli*, 491 F.2d 1108, 1120 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974). Moreover, before questions were put directly to Carroll concerning his drug dealings, Carroll gave affirmative answers to preliminary questions put by the prosecutor regarding the location of his supposed earlier narcotics dealings and an individual with whom he dealt (Tr. 226-228). Because affirmative answers to these preliminary questions corroborated the prosecutor's information concerning Carroll's activities. it was entirely proper to proceed to question Carroll directly about these activities. Moreover, Carroll was the beneficiary of a cautionary instruction from Judge Ward during this series of questions that the questions of counsel were not evidence, and that only the answers should carry any weight (Tr. 228).*

Finally, although we submit that there was no impropriety in these questions, and hence no unfair prejudice, any analysis of prejudice must take into account the strength of the Government's case. Even the cases on which Carroll places principal reliance in his brief hold that the impact of prejudicial conduct by the prosecutor must be measured against the strength of the proof of guilt. See *Berger* v. *United States*, 295 U.S. 78, 89 (1935); *Jones* v. *United States*, 338 F.2d 553, 554 (D.C. Cir. 1964). Here, the evidence of Carroll's guilt was overwhelming. He had participated in a direct sale of drugs to an undercover agent; he had been tape recorded discussing future drug sales; and he had signed two confessions. On his direct examination, furthermore, he had admitted selling mari-

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* Judge Ward had given similar instructions on two earlier occasions, during defense counsel's cross-examination of Government witnesses. (Tr. 45, 69).

juana frequently and participating in numerous illegal purchases of heroin and methadone. Against that background, we submit that the impact of the prosecutor's questions was minimal at worst.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JEREMY G. EPSTEIN,
JOHN D. GORDAN, III,
Assistant United States Attorneys, Of Counsel.

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